



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

DEC 19 2013

Eric E. Doster, Esq.  
Foster, Swift, Collins & Smith, PC  
313 S. Washington Square  
Lansing, MI 48933

RE: MUR 6613  
The American Way — Durant 2012  
Committee

Dear Mr. Doster:

On November 5, 2012, the Federal Election Commission notified your client, The American Way — Durant 2012 Committee and Walter Czarnecki in his official capacity as treasurer (the "Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint and information supplied by you, on December 6, 2013, the Commission voted to dismiss the allegations that the Committee violated 2 U.S.C. § 441a(f). The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

You are advised that the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) remain in effect, and that this matter is still open with respect to other respondents. The Commission will notify you when the entire file has been closed.

If you have any questions, please contact Jin Lee, the attorney assigned to this matter, at (202) 694-1530.

Sincerely,

Mark D. Shonkwiler  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** The American Way — Durant 2012 and **MUR 6613**  
Walter P. Czarnecki in his official capacity  
as treasurer

**I. INTRODUCTION**

This matter involves an allegation that the American Way — Durant 2012 and Walter P. Czarnecki in his official capacity as treasurer (“Durant Committee”) may have engaged in improper coordination with Prosperity for Michigan, an independent expenditure-only political committee. Specifically, the Complaint posits that similarities between a Prosperity for Michigan advertisement allegedly aired on July 12, 2012 (“Anti-Hoekstra Ad”) and an ad run by the Durant Committee suggest that Prosperity for Michigan may have coordinated its ad with, and thus made an unreported in-kind contribution to, the Durant Committee.

The Durant Committee denies that there was any coordination with Prosperity for Michigan. Durant Committee Resp. at 2 (Jan. 3, 2013). To the extent that its campaign ad was similar to Prosperity for Michigan’s Anti-Hoekstra Ad, the Durant Committee claims these similarities can be explained by “the longstanding and consistent objections” that many people had with Pete Hoekstra’s record, which were highly publicized. *Id.* (emphasis in original).

As discussed below, the Commission dismisses the allegation that the Durant Committee violated 2 U.S.C. § 441a(f) by knowingly accepting an excessive contribution via coordinated communications.

**II. FACTUAL AND LEGAL ANALYSIS**

Prosperity for Michigan is an independent expenditure-only political committee. *See* Prosperity for Michigan Statement of Organization (Apr. 6, 2012). The American Way – Durant

1 2012 is the principal campaign committee of Clark Durant, who was a Republican candidate for  
2 U.S. Senate in Michigan's primary election in 2012. *See* The American Way – Durant 2012  
3 Statement of Organization (Aug. 31, 2011). Durant lost the primary election to Pete Hoekstra on  
4 August 7, 2012. Rqst. for Dismissal.

5 The Complaint notes in a footnote that Prosperity for Michigan's Anti-Hoekstra Ad is  
6 "strikingly similar" to an ad, entitled "18 Years," paid for and authorized by the Durant  
7 Committee ("18 Years Ad") that began running at approximately the same time. Compl. at 2  
8 n.4.<sup>1</sup> The Complaint concludes the footnote saying, "[s]uch marked similarities raise serious

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<sup>1</sup> The Complaint states that "PFM's ad is strikingly similar to an ad paid for and sponsored by Clark Durant's official campaign committee and which began running on the same day. Both ads address the exact same topics, including allegations against Hoekstra about earmarks, raising pay, voting for bailouts and raising debt, and raising the debt ceiling." Compl. at 2 n.4. The Complaint cites the ad titled, "18 Years" that the Durant Committee apparently published on YouTube on July 22, 2012 (notwithstanding the allegation in the Complaint that the ad ran on television beginning July 21, 2012). *See* [http://www.youtube.com/watch?v=vd5g3\\_jnkH-I&feature=em-share\\_video\\_user](http://www.youtube.com/watch?v=vd5g3_jnkH-I&feature=em-share_video_user) (last visited Nov. 14, 2013). The Durant Committee's ad includes the following audio text:

I'm Clark Durant and I approve this message.  
Eighteen years in Washington changed Congressman Pete Hoekstra.  
Hoekstra voted for thousands of wasteful earmarks spending projects costing us billions.  
He voted five times to raise his own pay.  
And he voted for the \$700 Billion Wall Street Bailout.  
No wonder Hoekstra voted to increase the federal debt ceiling to over \$11 trillion dollars.  
Congressman Pete Hoekstra, he can't change Washington because he is Washington.

*Id.* The Complaint goes on to compare the Anti-Hoekstra television ad, aired by Prosperity for Michigan on July 23, 2012. *See* [http://www.youtube.com/watch?v=FLEVpEtU5yg&feature=em-share\\_video\\_user](http://www.youtube.com/watch?v=FLEVpEtU5yg&feature=em-share_video_user) (last visited Nov. 14, 2013). *See also* Satterlee Aff. ¶ 7 (stating that the ad ran on July 23, 2012). The Prosperity for Michigan ad includes the following audio text:

Washington needs reform.  
Yet for 18 years Pete Hoekstra helped cause the problems.  
Voting for millions in earmarks.  
Raising his own pay.  
Adding trillions to the debt.  
Raising the debt ceiling repeatedly.  
Clark Durant is a true reformer.  
Who'll fight to end Wild Spending and Earmarks.  
Stop Obamacare, Reject debt ceiling hikes.  
Pete Hoekstra can't fix Washington. He's part of the problem.  
Clark Durant will.  
Prosperity for Michigan PAC is responsible for the contents of this ad.

1 questions about coordination between Prosperity for Michigan and Durant’s official campaign.”

2 *Id.*

3       The Durant Committee contends that “there was NO coordination between the Durant  
4 campaign and the [Prosperity for Michigan] advertising efforts.” Durant Committee Resp. at 2  
5 (emphasis in original). The Committee claims that the criticism of Pete Hoekstra’s record on  
6 “earmarks, raising pay, voting for bailouts and raising debt, and raising the debt ceiling” was  
7 well-documented in and drawn from the public record. *Id.* According to the Committee, during  
8 Michigan’s 2010 gubernatorial race, in which Hoekstra and Michigan Attorney General Mike  
9 Cox both ran as candidates, Cox raised these same criticisms against Hoekstra. *Id.* During  
10 Durant’s 2012 campaign, Durant was therefore repeating the same objections that many have  
11 long made against Hoekstra’s voting record in Congress. *Id.* The Durant Committee specifically  
12 cites to one of its own campaign ads that aired in February 2012 that purportedly contains similar  
13 language to the Anti-Hoekstra Ad that was aired in July 2012.

14       The Act provides that no person may make a contribution, including an in-kind  
15 contribution, to a candidate and his authorized political committee with respect to any election  
16 for federal office which, in the aggregate, exceeds \$2,500. 2 U.S.C. § 441a(a)(1)(A).<sup>2</sup> In  
17 addition, no candidate or political committee may knowingly accept an excessive contribution.  
18 *See id.* § 441a(f). The Act defines contributions as, *inter alia*, expenditures by any person “in  
19 cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his  
20 authorized political committees, or their agents . . . .” *Id.* § 441a(a)(7)(B)(i). A communication  
21 is coordinated with a candidate, an authorized committee, a political party committee, or agent

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<sup>2</sup>       See also *Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold*, 76 Fed. Reg. 8368, 8369 (Feb. 14, 2011) (adjusting section 441a(a)(1)(A)’s limit for inflation to \$2,500 for 2011 and 2012).

1 thereof if it meets a three-part test: (1) payment for the communication by a third party; (2)  
2 satisfaction of one of four “content” standards of 11 C.F.R. § 109.21(c); and (3) satisfaction of  
3 one of six “conduct” standards of 11 C.F.R. § 109.21(d). *See* 11 C.F.R. § 109.21.

4 The Prosperity for Michigan ad satisfies the payment and content prongs of the  
5 coordination regulation.<sup>3</sup> The complaint is unclear, however, as to whether or how the conduct  
6 prong may have been satisfied.<sup>4</sup> While the advertisements sound similar themes, the Durant  
7 Committee notes in its Response that the issues presented in the ads are not new critiques of Mr.  
8 Hoekstra; indeed, “numerous televised ads” focusing on these same issues were run across the  
9 state of Michigan during his race for Governor in 2010.<sup>5</sup> Moreover, the complaint contains no  
10 allegations or information as to any communications between the Durant Committee and  
11 Prosperity for Michigan, nor does it identify any person who might have been in a position to  
12 share information between the two.

13 The Durant Committee has submitted a response — reviewed and affirmed by its  
14 Campaign Manager in a sworn declaration — stating definitively that “there was NO  
15 coordination between the Durant campaign and [Prosperity for Michigan] advertising efforts”  
16 and that the two ads repeated some of the same criticisms made against Hoekstra long before  
17 these ads were aired in July 2012. Durant Committee Resp. at 2 (emphasis in original).

<sup>3</sup> First, Prosperity for Michigan does not dispute that it made expenditures to air the Anti-Hoekstra Ad. Second, the Ad satisfies the content prong because it identifies both Clark Durant and Pete Hoekstra, who were both candidates for U.S. Senate, and was broadcast on television in Michigan on or about July 23, 2012, 15 days before Michigan’s primary election held on August 7, 2012. *See* 11 C.F.R. § 109.29(c)(4). Thus, the Ad qualifies as a public communication referring to a clearly identified candidate distributed within 90 days of an election. In addition, Prosperity for Michigan filed an Independent Expenditure Report in connection with the Anti-Hoekstra Ad, which by definition is only required for an expenditure that expressly advocates the election or defeat of a clearly identified candidate. *See* 2 U.S.C. § 431(17).

<sup>4</sup> Under Commission regulations, the conduct prong is satisfied if a communication meets one of six conduct standards: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; (5) former employee or independent contractor; (6) dissemination, distribution or republication of campaign material. *See* 11 C.F.R. § 109.21(d).

<sup>5</sup> *See* Durant Committee Resp. at 2.

1           The information presented in the complaint does not present sufficient basis to warrant  
2   the use of further Commission resources to investigate the allegation that the anti-Hoekstra Ad  
3   was a coordinated communication under section 109.21. Accordingly, the Commission exercises  
4   its prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 721 (1985), and dismisses the  
5   allegation that the Durant Committee knowingly accepted an excessive in-kind contribution in  
6   violation of 2 U.S.C. § 441a(f).

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